enable the equitable claimant to protect his claim by enabling him to bring an action if his claim be disputed ....."

In the case of *Assets Co. Ltd.* v. *Mere Roihi*[2] Lord Lindley said:–

"Then it is contended that a registered owner may hold as trustee and be compelled to execute the trusts subject to which he holds. This is true; for, although trusts are kept off the register, a registered owner may not be beneficially entitled to the lands registered in his name. But if the alleged *cestui que* trust is a rival claimant, who can prove no trust apart from his own alleged ownership, it is plain that to treat him as a *cestui que* trust is to destroy all benefit from registration. Here, the plaintiffs set up an adverse title and nothing else; and to hold in their favour that there is any resulting or other trust entitling them to the property is, in their Lordships' opinion, to do the very thing which registration is designed to prevent. Their Lordships cannot give effect to the ingenious arguments addressed to them on this point; nor can they adopt the case of *Solicitor-General* v. *Mere Tini* 17 NZLR 773 as an authority which ought to be followed in these appeals."

In other words, the principle of indefeasibility of title conferred by registration under the Torrens System cannot be defeated by setting up the fiction of a trust or by applying the principles of what has been called constructive or equitable notice. However, in our opinion, the dictum of Lord Lindley can be distinguished from the present appeal in that quite apart from his own assertion of ownership the respondent also produced a letter allegedly written by Tan Tock Sing on March 3, 1979 declaring the alleged trust. To use the words of Lord Diplock in *Eng Mee Yong & Ors.* v. *Letchumanan*[3] the learned judge was justified in holding that the claim of the respondent against Tan Tock Sing, the registered proprietor, is not baseless, frivolous or vexatious; in other words the affidavit evidence before the courts discloses that there is a serious question to be tried. Before dismissing the application the learned judge ordered the respondent to file a suit against Tan Tock Sing within one month from date thereof and on the balance of convenience, the learned judge was satisfied that in order to maintain the *status quo* the said caveat should remain until the trial of this action. We see no reason to differ from the conclusion reached by the learned judge. For the above reasons we dismiss the appeal with costs and order the deposit to be paid to the respondent to account of taxed costs.

Appeal dismissed.

Solicitor: *Azam-Malek & Soh; Humfrey Ball.*

MAT SHAH BIN MOHAMED & ANOR. v. FOO SAY MENG & ORS.

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Mohamed Azmi F.JJ.) February 2 to 4, March 15 & August 20, 1983]

[Kuala Lumpur – Federal Court Civil Appeal No. 178 of 1982]

Practice & Procedure – Appeal – Questions of fact – Appellate court will not interfere with finding of trial court based on assessment of evidence of witnesses.

Partnership – Death of partner – Whether property rights in licence belong to firm or individual – Partnership Act, 1961, ss. 24 & 35.

Practice & Procedure – Parties – Locus standi – Failure to sue estate of deceased person.

In this case the State Government of Kelantan had issued two timber concessions to a firm known as Syarikat Perusahaan Kayu Kayan Kelantan. There were two Syarikats of the same name, one in Kota Bahru and the other in Kuala Krai. The appellants claimed that the first appellant was the sole proprietor of the Syarikat and was the owner and holder of the two forest licences. They alleged that Foo Chow Juan (deceased) was once a logging contractor of the appellants and then subsequently the deceased unlawfully refused to return the licences to the appellants. He subsequently falsely represented to the State Forest officer that the two licences belonged to him and the State Forest officer accepted the deceased as the owner and holder of the licences. The respondents on the other hand claimed that the licences were lawfully issued to the deceased, Foo Chow Juan, who was a logger and sawmiller and that they and the deceased were partners. They claimed that on the death of the deceased, the partnership was not dissolved. After hearing the evidence, the learned trial judge believed and accepted the evidence adduced by the respondents. He held that the appellants had not discharged the burden of proof and therefore he was not satisfied that the appellants had established their claim as the rightful owner of the two licences. He dismissed the claim of the appellants. The appellants appealed.

Held, the learned judge in this case had the advantage of seeing and hearing the witnesses which opportunity the appellate court did not enjoy and there was no reason in this case for the appellate court to interfere in the case.

Cases referred to:

(1) *Chai Sau Yin* v. *Liew Kwee Sam* [1962] M.L.J. 152, 153.
(2) *Wray* v. *Wray* [1905] 2 Ch. 349.
(3) *Robinson* v. *Ashton* (1875) L.R. 20 Eq. 25.
(4) *Ashworth* v. *Munn* (1880) 15 Ch. D. 363, 369.
(5) *Brook* v. *Badley* L.R. 3 Ch. App. 672.
(6) *Attree* v. *Hawe* (1878) 9 Ch. D. 337.
(7) *In re Wilson, Wilson* v. *Holloway* [1893] 2 Ch. 340, 343.
(8) *Waterer* v. *Waterer* (1872-3) L.R. 15 Eq. 402, 406.
(9) *Lo Su Tsoon Timber Depot* v. *Southern Estate Sdn. Bhd.* [1971] 2 M.L.J. 161.

FEDERAL COURT.

Raja Abdul Aziz Addruse (*Dato H.L. Wrigglesworth* with him) for the appellants.
C. Jegathesan for the respondents.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the judgment of the Court): This is an appeal by appellants/plaintiffs against the decision of Mohamed Zahir, J. in dismissing their claim for a declaration that they are the lawful owners and holders of two Forest Timber Licences and other consequential reliefs.

The State Government of Kelantan granted two timber concessions to a firm known as Syarikat Perusahaan Kayu Kayan Kelantan (SPKKK). Consequently, two Forest Timber Licences No. K. U. 13/68 covering an area of 9,000 acres in Batu Melintang and No. K.S. 19/68 covering an area of 7,670 acres in Gua Musang were issued to the Pengurus of SPKKK. However, there are two Syarikats of the same name but with different addresses. The Kota Bharu SPKKK was registered on July 10, 1970 and commencing business on June 1, 1970 while Kuala Krai's SPKKK was registered on August 6, 1970 and commencing business on July 1, 1970. The issue before the learned Judge and before us is the answer to the question who is the actual owner of the two licences.

The facts were set out fully by the learned Judge. We can do no better than to refer to his judgment at page 190 of the Appeal Record:—

"The 2nd plaintiff was formerly the State Forest Officer in Kelantan from November 1, 1960 to 1968 and he went on optional pension at the age of 50 years and 3 months. Whilst waiting for retirement, according to his evidence, he applied for a timber concession at Batu Melintang on March 15, 1968 and which according to him was approved on April 1, 1968. He applied under the name of Syarikat Kayu Kayan Kelantan and gave his official address then at No: 276, Jalan Raja Dewa (NAB) 32). He then went to see the Menteri Besar who advised him as he was still in service to submit another application in the name of another Syarikat with Sino-Malay joint venture which he did and backdated the application to March 15, 1968. The application is NAB 34 signed by the plaintiff ...".

At page 189 of his judgment the learned Judge sets out the parties' positions this way:—

"The plaintiffs alleged that on or about July 7, 1968, the 1st plaintiff was the sole proprietor of SPKKK and was the owner and holder of the two forest licences aforesaid. It was alleged that the said Foo Chow Jian, deceased, was once a logging contractor of the plaintiffs.

It was further alleged that in early 1970 the plaintiffs worked on the area under Licence NO: K.U. 13/68 by extracting logs therefrom and paying royalties to the State Government. It was alleged that in March, 1970, the deceased unlawfully refused to return the two licences to the plaintiffs and on or before February 23, 1971 it was alleged that the defendants and the deceased falsely represented to the State Forest Officer (SFO) that the two licences belonged to them and on January 23, 1971 the SFO unlawfully accepted the said deceased as owner and holder of the said licences. It was further alleged that on November 8, 1971 the SFO refused to collect royalty tendered by the plaintiffs for logs felled in the two areas and prevented the plaintiffs from working there.

It was further alleged that on February 5, 1972 the deceased died and the Statement of Claim alleged that the said partnership between the defendants and deceased was dissolved. It was further alleged that the defendants and the deceased never worked in the two areas.

The defendants deny that the licences were not lawfully issued to the deceased, who, as they claim, was before his death, a logger and sawmiller in his own right and pleaded that the deceased was in lawful possession of the licences and pleaded that the State Government lawfully refused to receive royalties from the plaintiffs as they are not the lawful owners. Whilst admitting the death of the deceased, the defendants deny that their partnership was dissolved. They also admit not working in the two areas but the explanation was that it was because of the dispute between themselves and the plaintiffs as to the ownership of the two licences.

The defendants in the alternative pleaded fraud and the particulars as given were that the plaintiffs stole three files relating to the timber areas from the State Forest Department and the application relating to Licence No: KU 13/68 and the application relating to Licence No: KS/19/68 were fraudulently tampered with so that the plaintiffs' claim could be authenticated and it was alleged that the plaintiffs knew of these tamperings or ought to have known that they had been tampered with. It was further alleged that the plaintiffs used these documents as genuine on January 31, 1973 by swearing an affidavit in support of these claims and the defendants claimed damages for loss of profits on account of not being able to work in the areas.

The 1st plaintiff has since died and he is being represented by his son, Mat Shah bin Mohamed and 4th defendant also since died and being represented by Wan Tin Siong."

The two licences were issued to the Pengurus of SPKKK. The learned Judge considered that it would be all right to grant the licences to a Pengurus as an individual but not to a Syarikat which unlike a limited company under the Companies Act, is not a person. Rule 2 of the Forest Rules speaks of "person". Also Rule 5 refers to "a holder of a licence" which must necessarily refer to a person. Counsel for appellants submitted that the learned Judge was wrong to say that the licences could not be issued to a Syarikat. Neither in the Forest En-

actment nor in the National Land Code is the word "person" defined. In the absence of such a definition, the submission of appellants is that one must turn to the Interpretation Ordinance, 1948. There it states quite clearly that a person or party includes any body of persons, corporate or incorporate. Reference is not made to the Interpretation Act, 1967 as it does not apply to the situation prior to 1967. It is therefore the submission of the appellants that it is quite proper to grant a licence to a Syarikat. It was said that the learned Judge seemed to distinguish between approval and issuance of licences. The issuance of a licence must follow the terms of the approval. Approving is a policy matter while issuing is an administrative matter. We would stress that the learned Judge pointed out that at the time of approval neither Syarikat was in existence. The Kota Bharu SPKKK was registered on July 10, 1970 and the Kuala Krai SPKKK on August 6, 1970. On the evidence the learned Judge was satisfied that Foo Chow Jian was the licensee and the holder of the two licences. Foo also accepted the additional conditions to the licences without having to consult anyone. He held that Foo was the owner of the two licences unless it was proved that he obtained them by fraud. There is authority to support the view of the learned Judge that the licences cannot be granted to a Syarikat but to a natural person. In *Chai Sau Yin v. Liew Kwee Sam*[1] the Privy Council held that a partnership cannot be licensed whoever the partners may be because changes in the partnership are likely to occur and cannot be controlled unless the partners are individually named in the licence. It seems therefore that if the concessions were granted to a Syarikat then all the partners in the Syarikat must be named in the licences. On the facts of this particular case the learned Judge was perfectly right to hold that the licence was issued to an individual. One could not issue a licence to a non-existing Syarikat.

On the death of a partner the partnership is dissolved. This is clearly laid down under section 35(1) of the Partnership Act, 1961 which reads:–

"Subject to any agreement between the partners every partnership is dissolved as regards all the partners by the death or bankruptcy of any partners."

On dissolution of a partnership all the properties of the firm, real and personal will have to be sold. Hence, in equity, it is deemed to have been already converted into personal estate and therefore devolves as such. If several partners are joint owners of a parcel of land then on the death of one the legal estate will devolve on the survivors subject to the equitable rights of the representatives of the deceased: *Wray* v. *Wray*.[2] On the other hand, if the land is vested in one partner alone the legal estate will vest on his death on his personal representatives in trust for the other partners and the persons entitled to the deceased's estate according to the partnership agreement.

The difficult question in this case is whether the property rights in the licences belong to the firm or an individual. For the property may be used for the purpose of the partnership and yet may not be part of the partnership property. It is of great importance to know whether the property is partnership property for three main reasons. One is the position of the partners themselves. This may be wholly governed by the terms of the partnership agreement. It should be remembered that an increase in the value of partnership property belongs to the firm, whereas if the property is the property of an individual partner the increased value belongs to him only: *Robinson* v. *Ashton*.[3] The second is the position between the creditors of the firm and the creditors of individual partners in the event that the firm becomes insolvent. The third is the position of those persons who take the partner's real estate and those who take his personal estate. Whether the property has become partnership property or not is a question of fact.

Another point taken by appellants is that the learned Judge was wrong to say that if new partners were admitted then the transfer became illegal. It was submitted that a licence could be issued to a Syarikat so that the death of a partner does not involve the transferability of a licence. There is a distinction between the right to property held jointly in the names of individuals and property held by individuals for partnership business. Thus in *Ashworth* v. *Munn*[4] James, L.J. said at page 369:–

"Now the case of a private partnership stands upon a very different footing, not only practically but theoretically, in point of law and upon the ground which was pointed out by Lord Cairns in *Brook* v. *Badley*[5], to which we have been referred – but which does not seem to have been adverted to in some of the other cases – that, whether it is going beyond the preamble or not, one of the things which the statute in express terms hits at is anything which is a charge or incumbrance upon real estate. Those very words are in the statute, and were put in for the purpose of preventing those possible evasions, some instances of which I attempted to give in the judgment in *Attree* v. *Hawe*(6). There are the words 'any charge or incumbrance.' Now, it appears to me that in a private partnership which

has got land it is difficult to say that the partner has not an interest in land – not qua partner, because I agree with what Mr. Higgins has said, that it does not signify in whom the legal estate is, in whom the ownership of the freehold is that that may be either in all the partners or one or more of the partners, or it may be in a trustee wholly outside the partnership, and I agree that the beneficial interest is a beneficial interest in the partners not as tenants in common or as joint tenants, or anything of that kind, but their interest is exactly in proportion to what the ultimate amount coming due to them upon the final taking and adjustment of the accounts may be. Suppose the capital of the firm consisted of land, as it does in this case, and that this was made to appear in the books, as it ought to appear if the books were properly kept; and that the capital of the firm consisted of, say £60,000, or any large sum of the kind – there might be due to one partner so many thousand pounds, shillings, and pence, and there might be due to another partner so many thousand pounds, shillings, and pence, and from another there might be a sum due, and he would be obligated to contribute that sum to make up the proper amount of capital. Therefore the share of each of the other partners no doubt is not a share in any specific asset or any specific part of the assets real or personal, but is his share of what will ultimately come to him when the accounts are ascertained, and when the partners who are to contribute have contributed, and when the assets are got in, the debts paid, and the amounts realized. But then, although there be the right of each partner in so much capital stock, which is personalty, and I should say in one sense is pure personalty, because it is personalty as between the real and personal estate, still it is exactly that which comes within the very words of the statute ..."

See also *In re Wilson; Wilson* v. *Holloway*[7]; *Waterer* v. *Waterer.*[8] This has to be so as after the death of Foo Chow Jian the surviving partners purported to carry on business as if the licences were partnership property and dealt with them as such by the four respondents. Hence, they entered into an agreement dated June 18, 1972 with Ng Kin San. The appellants said the partnership was dissolved but the respondents disagreed. The appellants therefore submitted that the respondents were the proper party to sue. In paragraph 11 of the Defence the respondents denied that they had entered into any contract with Sin Cheong Hin Plywood Sdn. Bhd. to work and to move logs from the two areas and that Sin Cheong Hin Plywood Sdn. Bhd. had commenced work in the two areas.

Appellants said even if the learned Judge is correct that there is the provision of 0.15 r.6 dealing with joinder and misjoinder of partners they pointed out that the 1st respondent was the administrator of Foo Chow Jian. Any irregularity is therefore cured by his being made a party. However, it must be pointed out that 1st respondent was not sued in his representative capacity as administrator of Foo Chow Jian. The submission of the appellants that since neither the court nor the administration thought fit to join the estate of Foo Chow Jian the non-joinder is not fatal in the light of 0.15 r. 6 is without merit. They brought the respondents to court. It is for them to state clearly in what capacity they were suing the respondents. It is for them not the respondents to bring in the estate of Foo Chow Jian. It is for them to say that they are suing the 1st respondent as administrator and not in his personal capacity. No amendment has been made to the pleading. The learned Judge considered that the failure to make the estate of Foo Chow Jian a party was fatal to the appellants' claim. This alone was enough to dispose of their claim. However, the learned Judge decided to deal with other matters raised by the parties.

Section 24 of the Partnership Act (Act 135) provides:–

"Where land or any interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal and not real estate."

This is merely a restatement of the principle enunciated in the case of *Ashworth* v. *Munn.*[4]

It follows that 2nd appellant had no right whatsoever to the licences prior to the partnership if the 1st appellant was the sole holder of the licences. In the same way if Foo Chow Jian was the holder of the licences he could not transfer his rights in the licences. It would be illegal being in contravention of the said Rule 2 of the Kelantan Forest Rules, 1939. The respondents therefore could not have been constituted defendants in the lower court.

Counsel for appellants complained that the learned Judge overlooked the evidence of PW4, PW6 and PW22. This is indicative of the view the learned Judge took of the case from the beginning. There is no finding of obtaining of approval of the licences. It is the contention of appellants that until DW5 appeared on the scene there was no dispute as to ownership of the licences. Whether the court believes DW5 or not is solely a matter for the court. The appellants want a declaration. The burden is on them.

Appellants maintained that the respondents' evidence merely caused confusion. The respondents merely persuaded the court to look at the documents which they said had been altered. But, that does not make them the owners of the licen-

ces. We are satisfied that the learned Judge had considered the evidence carefully. The Menteri Besar testified that the original approval given to the application of 2nd appellant (NAB32) was cancelled and replaced by (NAB34) which was approved on April 1, 1968. AB5 is the Melintang application. It was approved on May 25, 1968. We do not think it is correct to say that the learned Judge overlooked the fact that the concessions were granted to the appellants' SPKKK. In fact, he pointed out neither the Kota Bharu SPKKK nor the Kuala Krai SPKKK was in existence when approval was given to the two applications of SPKKK. Of course there is nothing wrong in registering a Syarikat after approval. But during the period between approval and registration a lot can happen as shown by this case. On the assumption that the licences were given to 1st appellant then they belonged to him alone. The learned Judge was therefore right to say that the 1st appellant could not transfer his rights to 2nd appellant on July 1, 1970 some two years after approval, as this would be illegal. Part 2 rule 2 of the Kelantan Forest Rules, 1939 states clearly that no licence shall be transferable. Therefore the purported transfer of his rights to 2nd appellant by means of a partnership agreement would be contrary to law. Therefore the learned Judge was perfectly right to say that the 2nd appellant has no *locus standi.* On the question of illegality reference may be made to the case of *Lo Su Tsoon Timber Depot* v. *Southern Estate Sdn. Bhd.* [9] As his application was cancelled by the Menteri Besar 2nd appellant enjoyed no right whatsoever under the licences prior to the partnership. Further, by their pleadings 1st appellant was alleged to be the sole proprietor of the Kota Bharu SPKKK and the holder of the two licences. Yet the two licences were all the time with Foo Chow Jian. The Menteri Besar would not have granted 2nd appellant any logging licence while he was in service. (NAB32) was approved on April 1, 1968. It was not a replacement of (NAB34) as suggested. 2nd appellant retired on November 1, 1968. Therefore, he could not be a joint proprietor while he was in service without contravening General Orders.

One other important matter referred to by the learned Judge was that according to 2nd appellant Foo Chow Jian was employed and appointed by him as a logging contractor after receipt of letters AB135 and AB136 whereon the Pengurus was asked to work on the concession as early as possible. The two letters bore the same date, i.e. February 3, 1970. A perusal of AB5 would reveal the date of the application signed by Foo Chow Jian for Batu Melintang Area was May 6, 1968. What 2nd appellant said could not be true. This point was also noted by the learned Judge.

It is not surprising that the learned Judge did not believe that the 2nd appellant handed the two licences to Foo Chow Jian for renewal before the expiry date in June, 1970. The licences were renewable every six months. They were renewed on June 30, 1970, December 31, 1970 and June 30, 1971. Yet, 2nd appellant did nothing to recover the licences from Foo. Again, it was pointed out that Foo signed the additional conditions as licensee on July 4, 1971. There was also no evidence that Foo knew of the existence of the other Syarikat. He believed Foo had the licences all the while. Something must be wrong if the appellants did nothing to recover the licences after Foo had renewed them on so many occasions and had even agreed to additional conditions without consulting them. They did so only after Foo died. Another important fact is that 2nd appellant did not appeal to the Menteri Besar after DW5 decided that the licences belonged to Foo. It seems strange that the Menteri Besar should ask DW5 to investigate and decide who was the rightful owner of the two licences when he knew all along that they belonged to the appellants. He could have told DW5 that the licences belonged to the appellants and no investigation was necessary. He accepted the decision of DW5 that Foo was the rightful owner.

With regard to the Gua Musang area according to 2nd appellant the 1st appellant applied for the licence under the name of Syarikat Pantai Renok on April 20, 1968. Again, according to 2nd appellant Syarikat Pantai Renok changed its name to Syarikat Perusahaan Kayu Kelantan because the Menteri Besar wanted to adhere to one Syarikat only. This application according to the learned Judge had nothing to do with the 2nd appellant as a co-proprietor as he had no standing.

We were urged to look into the various documents, such as AB9, AB11, AB16 and P.22 by the appellants. On the part of the respondents we were asked to look also into AB5 and AB7. According to appellants AB11, AB16 and P.22 show clearly that the licences belong to Kota Bharu SPKKK. On the other hand, the respondents alleged that AB5 and AB7 had been tampered with. The alleged tamperings on AB5 are that the address and the name of the Pengurus Mohd. bin Hussain was not in the same alignment and that the word "Pengurus" had double impression. Similarly, allegation of tampering with the address on AB7 was made.

The additional conditions in the licence were signed by Foo. The conditions were attached to the licence as an annexure but the annexure had since disappeared. The two licences were issued in July and August in the same year. Both were signed by Foo. D.W.5 assumed duty on July 14, 1970. Appellants questioned the signature of D.W.5 above that of Foo as it was contended that D.W 5 had not assumed office as State Forest Officer. It is the submission of the respondents that the date July 4, 1970 does not bear the significance it was supposed to bear as the date is a stamped date. The appellants said that the learned Judge should accept the evidence of the Menteri Besar (P.W.4). Whether he does or not is clearly a matter for him after seeing and hearing the Menteri Besar. We do not think the Menteri Besar impressed the learned Judge very much as a witness of truth. In reply to cross-examination the Menteri Besar stated at page 97 of the Appeal Record:—

"Yes, I remember in 1970 one Othman referred to the Forest Committee as to the dispute in the ownership of the two licences between Foo Ice Cream and P.W.1. Yes, I said in the criminal case below that when Othman reported the matter to me, I knew about the dispute. Yes, I remember directing Othman to investigate into the matter and to settle it by himself as to the ownership of the licences. Yes, Othman acted on the instruction of the Forest Committee to investigate. He decided that the licences belonged to Foo.

Later, at page 98 he said:—

"I came to know the signature of Foo Ice Cream in AB5 during the criminal hearing. As far as I remember there was only one application made by Foo and I stated this in my evidence in the criminal case. In AB5 I was not particular as to the date ..."

In answer to the Court the Menteri Besar said:—

"When I or the Forest Committee were considering the applications, the particulars of Business Registration were not before us. This was always the case. I and the Committee would be informed who were the applicants. The proprietors were not recorded anywhere. Yes, I and the Committee would ask the S.F.O. to require the successful applicant to have the business registered. In principle, I or the Committee would approve the application to a Syarikat. As in AB7, I wouldn't know who his partners were."

In order to decide who is the rightful owner of the two licences one has to look carefully into the facts as well as the documents. Much more important in such a case is the assessment of the credibility of each witness. The learned Judge has the advantage of seeing and hearing the witnesses which opportunity an appellate court does not enjoy.

The learned Judge himself took notice of the question of illegality though it was not pleaded by the respondents. Another point taken by the learned Judge is that the failure of the appellants to sue Foo Chow Jian, deceased, is fatal to the appellants' case. He took the view that it was Foo who was being named by the appellants as the one who converted the licences to his name. Therefore, his estate must be given an opportunity to defend as the court might make an order affecting his estate. Since his estate was not made a defendant the learned Judge considered that the appellants' claim should be dismissed on this ground alone. The learned Judge was clearly not impressed by the 2nd appellant as he considered the 2nd appellant would do anything to claim ownership of the licences even to the extent of falsifying the documents to substantiate his claim.

According to D.W.5 he testified that after taking over from P.W.2 (Darus) 2nd appellant came to see him sometime in August, 1970. He said the visit by 2nd appellant was:—

"... to inform of two forest areas, one in Gua Musang and the other in Batu Melintang, stating that both areas belonged to him. As a result, I called for the files for both areas and checked them. (Two files produced) — Yes these are the files, one is PHN.KN 144/68 relating to Licence No. K.U. 13/68, Batu Melintang area and the other PHN.KN 170/68 relating to Licence K.S. 19/68 for Gua Musang area. The applicants for both are Syarikat Perusahaan Kayu Kelantan (Files produced marked D43 and D44 respectively).

I checked the original applications in the files and found that both applications were signed by Foo Chow Jian. I informed P.W.1 about this on the same day. He told me that Foo Chow Jian signed on his behalf."

D.16 and D.17 are supposed to be the original applications. D.W.5 observed:—

"D16 does not bear the signature of Foo Chow Jian and D17 in its original form there was no name 'Mohamed bin Hussain' typed underneath the signature of Foo Chow Jian and also the word 'wakil' was not there."

He invited both sides to the dispute to a meeting on September 10, 1970 to determine the ownership of the two licences. Foo Chow Jian and the wife of 2nd appellant attended. D.W.5 saw the original application in the file again. He saw both were signed by Foo Chow Jian. He then told the partners that:—

"... according to the record there was no other name appearing except Foo Chow Jian's signature on the original appli-

cations and that Foo Chow Jian was the person who acted for Syarikat Perusahaan Kayu Kayan Kelantan."

The learned Judge did not think D.W.5 had any reason to testify against the appellants. He accepted D.W.5 as a witness of truth. He had seen and heard all the witnesses and studied all the documents before him. He believed and accepted the evidence adduced by the respondents. He held that the appellants had not discharged the onus of proof. Therefore, he was not satisfied that the appellants had established their claim as the rightful owner of the two licences. He therefore declined to make the declaration prayed for and dismissed the claim with costs. He also dismissed the respondents' counter-claim with costs. We do not consider that an appellate court has any reason to interfere in a case of such nature. Accordingly, we would dismiss the appeal with costs. Deposit to the respondents on account of taxed costs.

Appeal dismissed.

Solicitors: *Wrigglesworth & Co.; Jegathesan & Co.*

KENG HUAT FILM CO. SDN BHD v. MAKHANLALL (PROPERTIES) PTE. LTD.

[F.C. (Abdul Hamid, Mohamed Azmi & Hashim Yeop A. Sani F.JJ.) July 19 & August 20, 1983]

[Ipoh – Federal Court Civil Appeal No. 184 of 1982]

Landlord and Tenant – Lease of cinema for a period of 10 years with option to renew for a further period of 10 years – Construction.

Evidence – Exclusion of oral evidence by documentary evidence – Factual background of case – Evidence Act, 1950, ss. 91 to 99.

In this case the respondent company and its predecessor company owned a cinema in Ipoh and had entered into an agreement with one Ong Keng Huat and his partners to lease the land for a period of five years from September 1, 1956. Under Clause 4(e) of the agreement the lessees had a right to renew the lease for a further period of 5 years from the expiration of the period. The option to renew was not exercised but the respondent company subsequently on February 14, 1968 gave a lease for 5 years of the land to the appellant company retrospectively from September 1, 1966. Under Clause 4(e) of this lease the appellant was given an option to renew the lease for a further 10 year period upon giving the respondent a written 6 months' notice of the intention to renew. Under the said Clause it was also provided that the lessor would grant to the lessee at the expiration of the lease a further term of 10 years at the same rent and containing the like covenants and provisoes as were therein contained. In 1971 the appellant gave the necessary notice to ask for the renewal of the lease and sent a draft of the second lease to the respondent. The respondent returned the draft lease but with Clause 4(e) containing the covenant for renewal deleted. Although the second lease was not executed the appellant continued to remain in possession of the premises. The respondents wrote to the appellant on January 18, 1981 asking for vacant possession of the premises by August 31, 1981. The appellant refused to vacate contending that it had the right to perpetual renewal under the first lease if the option to renew was exercised on each occasion, and such perpetual lease would be valid for 99 years under section 221(3)(a) of the National Land Code. The appellant applied for specific performance of the renewed lease with the covenant for perpetual renewal inserted as a term of the agreement. The learned trial judge dismissed the claim and the appellants appealed.

Held: (1) the words "containing the like covenants and provisoes as are herein contained" constitute a general covenant and such words without more are far from clear and fall short of the legal requirement to confer what in effect would amount to a perpetual lease by means of perpetual renewals. In the light of the words used the learned trial judge was correct in holding on the true construction of Clause 4(e) of the lease that it does not confer on the appellant the right to perpetual covenant for renewals;

(2) the 1957 lease was part of the Agreed Bundle of documents and its existence and contents were not in dispute. It should be classified as factual background of the case known to the parties at or before the first lease was executed and therefore admissible in evidence and the trial judge was entitled to use it not for the purpose of construing the first lease but for showing inconsistency between the factual background and the claim of the appellant to perpetual renewal of the first lease.

Cases referred to:

(1) *Re Hopkin's Lease* [1972] 1 All E.R. 248, 251; [1972] 1 W.L.R. 372, 394.
(2) *H.L. Bannerji* v. *Chin Cheng Realty (Pte.) Ltd.* [1983] 1 M.L.J. 18, 20.
(3) *Sir John Swinburne* v. *George Milburn & Ors.* (1884) 9 App. Cases 844
(4) *Baynham* v. *Guy's Hospital* (1796) 3 Vesey Jr. 295 – 299; 30 E.R. 1019.
(5) *Moore* v. *Foley* (1801) 6 Vesey Jr. 232 – 238; 31 E.R. 1027.
(6) *Hare* v. *Burges* 70 E.R. 19, 23.
(7) *Bridges* v. *Hitchcock* (1715) 2 E.R. 498.
(8) *Furnival* v. *Crew* 26 E.R. 851.
(9) *Iggulden* v. *May* (1806) 8 K.B. 623, 629; 103 E.R. 91.
(10) *Sadlier* v. *Biggs* 10 E.R. 531.
(11) *Prenn* v. *Simmonds* [1971] 3 All E.R. 237, 241.
(12) *Citibank N.A.* v. *Ooi Boon Leong & Ors.* [1981] 1 M.L.J. 282, 283.

FEDERAL COURT.

Lim Kean Chye for the appellant.
R.K. Sharma for the respondent.

Cur. Adv. Vult.